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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~977~~ 69

GEORGE K. WYMAN, individually and as Commissioner of the State of New York, Department of Social Services, JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York,

Appellants,

against

BARBARA JAMES, individually and on behalf of her minor child Maurice James, and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT OF APPELLANT WYMAN

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT OF APPELLANT WYMAN

Appellant, George K. Wyman, appeals from a judgment and order of the United States District Court for the Southern District of New York (statutory three-judge court) entered on October 1, 1969, declaring Section 134 of the New York State Social Services Law, Section 175 of the Policies Governing the Administration of Public Assistance,

and Sections 351.10 and 351.21 of Title 18 of the New York Code of Rules and Regulations (N.Y.C.R.R.), unconstitutional insofar as they authorize or require state and local officials to deny, reduce or terminate Aid to Families with Dependent Children benefits because the applicant or recipient refuses to consent to home visits by welfare officials and enjoining the defendants from enforcing any home visit requirement in the absence of consent or a valid search warrant.

Opinions Below

The opinion of the single district judge ordering the convening of a three-judge district court, dated June 13, 1969, is reported at 302 F. Supp. 478. It is reproduced herein as Appendix "A". The majority and dissenting opinions of the three-judge court, dated August 18, 1969, are reported at 303 F. Supp. 935. They are reproduced herein as Appendix "B". The final order of the District Court, dated October 1, 1969, is reproduced herein as Appendix "C". Theere were no separate findings of fact and conclusions of law.

Jurisdiction

The judgment and order of the District Court were entered on October 1, 1969. The notice of appeal was filed on October 24, 1969.

The jurisdiction of this Court to review the instant case is conferred by 28 U.S.C. § 1253.

Statutes and Regulations Involved

The relevant statutes and regulations, New York Social Services Law, § 134, New York Code of Rules and Regulations, Title 18, §§ 351.10 and 351.21 and Policies Governing the Administration of Public Assistance, § 175, are reproduced herein as Appendix "D".

Questions Presented

1. Do the New York statutes and regulations mandating home visits to applicants or recipients for AFDC assistance represent a valid state interest reasonably implemented?

2. Does a scheduled daytime home visit violate any right of privacy of the AFDC applicant or recipient protected by the Fourth, Fifth, Fourteenth or any other amendment to the Constitution?

3. Did the District Court apply the correct standard of proof in assessing the issue before it?

4. Did the District Court properly grant plenary declaratory and injunctive relief in view of the posture of the case when it was argued before that Court?

5. Should appellee have been required to pursue her state administrative remedies?

Statement of the Case

Claiming a violation of rights secured to her by the First, Third, Fourth, Fifth, Sixth, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States and by Titles IV and XVI of the Social Security Act, 42 U.S.C. §§ 601 *et seq.* and §§ 1381 *et seq.* and the regulations promulgated thereunder, appellee brought this action for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343(3)(4), 2201, 2202. The action was commenced by summons and complaint brought on by order to show cause served on the office of the attorney for appellant on Friday, June 6, 1969 and returnable on Tuesday, June 10, 1969.

The gravamen of the complaint was that the State could not enforce a policy of terminating Aid to Families with Dependent Children (hereinafter AFDC) assistance by virtue of the recipient's refusal to consent to home visits by local caseworkers because such a policy violated the right to be free from unreasonable searches and seizures and the right of privacy. Under New York law, a home visit is required to determine initial eligibility for AFDC assistance and is included as one of the means for redetermining eligibility. N.Y.C.R.R. 351.10, 351.21.

The appellee, Barbara James, was alleged to be the mother of a needy child and both Mrs. James and her son claimed to have no other income or resources for support other than the public assistance benefits received under the New York AFDC program.

The complaint alleged that on May 8, 1969, a caseworker in the New York City Department of Social Services, wrote to appellee requesting an appointment to visit her on May 14, 1969. Appellee contacted the caseworker and told her that, although she would be willing to supply any information that was "reasonable and relevant" to her need, any such discussions must take place not in her home but rather in the offices of the Social Services Department. The caseworker explained to appellee that regulations required a home visit and that her refusal to permit such a visit would result in termination of her welfare benefits. Appellee continued to refuse permission for a home visit.*

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* Appellee has never satisfactorily established even her initial eligibility for AFDC assistance and has consistently refused to supply information to the Department of Social Services. This, together with many other alarming features of appellee's history, is made clear from her case record with the New York City Department of Social Services. That record, which was submitted to the

(footnote continued on following page)

The sole basis set forth in the complaint for the refusal to consent to a home visit was that, on previous visits to the home of appellee "and, on information and belief, of all other persons similarly situated, questions concerning personal relationships, beliefs and behavior are raised and pressed which are unnecessary for a determination of continuing eligibility."

On May 13, 1969, the appellee was notified of the intention of the Department of Social Services to discontinue assistance because of her refusal to permit a home visit by her caseworker for purposes of recertifying her as eligible for AFDC benefits. On May 27, 1969 a "prior review" hearing was held at which plaintiff and her attorney once more refused to allow a caseworker into the home and termination of benefits was directed on June 2, 1969.

Based on these allegations, appellee claimed that her right of privacy was being invaded, that the termination of public assistance would cause irreparable injury and that state administrative remedies need not be exhausted.

The complaint sought the convening of a three-judge court to hear and determine the matter, and a temporary restraining order and preliminary injunction ordering appellees restored to the assistance to which they and the class they represent were entitled and ordering that the policy at issue not be enforced during the litigation. It further

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(*footnote continued from previous page*)

Court below and ordered sealed, has been ordered transmitted to this Court still sealed. Although appellant consented to the sealing below to forestall publication of any of the details contained therein, it does contain material highly germane to the issues on this appeal. In view of the uncertain scope of the restrictive order as it presently stands only limited reference is made to the record (Exhibit 1, annexed to Defendant Wyman's answer). However, included in our application for a stay, submitted herewith, is an application to conceal the case record or, in the alternative, to permit detailed reference to it.

sought a judgment declaring that the "policies and practices complained of" were unconstitutional; that welfare officials could not "discontinue, or reduce financial assistance, or otherwise interfere with the receipt of such assistance" because of the recipient's refusal to consent to entry without a search warrant, that there could not be a threat to take such action; that no consent could be deemed freely given unless the recipient were told that failure to consent could result in termination, reduction or interference with benefits; and, that there could be no entry or search of any rooms and no touching or examination of any objects except pursuant to a search warrant or on the basis of free consent after a warning that no adverse consequences could result from a refusal to consent.

The complaint also asked for a permanent injunction restraining entry into homes without search warrants or consent and restraining "[i]nterrogating or questioning an applicant for or recipient of public assistance regarding activities not demonstrably relevant to issues of eligibility."

The order to show cause requested a preliminary and permanent injunction restraining the defendants from entering the home of plaintiff and others similarly situated without either a warrant "issued upon probable cause" or the freely given consent of the recipient after a warning that he need not consent; the convening of a statutory three-judge court; a class action order pursuant to Federal Rules of Civil Procedure, Rules 23(a), (b)(2); and, a temporary restraining order preventing the discontinuance of aid to the named plaintiff because of her refusal to consent to a home visit.

On June 10, 1969, the return date of the order to show cause, appellant was given until June 13, 1969 to file a memorandum of law with respect to the need for a three-judge court and a temporary restraining order in behalf of Mrs. James. On June 13, the memorandum was filed and, on that very day, the District Judge, the Honorable

Charles Tenney, issued a written opinion holding that "the recent decisions in *Thompson* v. *Shapiro*, 270 F. Supp. 331 (D. Conn. 1967), *aff'd* [394 U. S. 618]; *King* v. *Smith*, 392 U. S. 309 (1968); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *McDonald* v. *United States*, 335 U. S. 451 (1948) and *Parrish* v. *Civil Service Comm'n of the County of Alameda*, 66 Cal. 260, 425 P. 2d 223, 57 Cal. Rptr. 623 (1967), necessitate the convening of a three-judge district court to consider the substantial constitutional questions relating both to the Fourth Amendment's stricture against unreasonable searches and seizures and to the penumbral right of privacy and repose raised herein."

Disregarding the more limited request of the order to show cause, the court went on to issue a temporary restraining order with respect to "all persons who, while receiving public assistance grants are unwilling to consent to the entry of officials of the Department of Social Services into their homes" since denial or termination of aid to them in the event of refusal would cause irreparable injury "both clear and abundant, while the cost to the State and City is obscure and minimal." The temporary restraining order contained the warning provision sought by appellee only in the preliminary and permanent injunctions.

Finally, the single district judge, notwithstanding appellant's argument that such a finding should be made only by the three-judge court, determined that the action "may properly proceed as a class action pursuant to Fed. R. Civ. P. 23."

The three-judge court was designated the following week. In addition to Judge Tenney, the Court consisted of Circuit Judge Wilfred Feinberg of the United States Court of Appeals for the Second Circuit and District Judge Edward C. McLean of the United States District Court for the Southern District of New York. Appellee was required to file her papers by June 23, 1969. Appellant

had until June 26, 1969 for answering papers and oral argument was set for June 30, 1969.*

On August 18, 1969, the Court, Judge McLean dissenting, rendered its written opinion holding the state policy unconstitutional. The majority opinion, written by Judge Tenney, started from the fundamental proposition that "[t]he overriding function and basic purpose of this Amendment (the Fourth) is to safeguard the personal privacy, security and dignity of individuals against the arbitrary or unwarranted intrusion of governmental officials," and moved on to the assertion that "a search without a warrant or proper consent is presumptively 'unreasonable' ". On this analysis, Judge Tenney viewed the issues as being whether required home visits are searches within the meaning of the Fourth Amendment; whether the Fourth Amendment was designed to protect appellee and her class; and, if both questions were answered in the affirmative, whether the State of New York could condition AFDC benefits on a "waiver of rights embodied in the Fourth Amendment".

After characterizing as "frivolous" any contention that home visits were not searches within the meaning of the Fourth Amendment and pointing out that "[t]he guarantee of protection against unreasonable searches extends to the innocent and guilty alike" and is not limited to a protection against the search for evidence of crime, the majority stated that:

> "[G]overnmental power to make a warrantless search is no greater even if the object of the search is not related to the discovery of evidence of welfare fraud

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* Appellee filed a memorandum of law and identical supporting affidavits by twelve other welfare recipients. Appellant filed an answer and exhibit consisting of appellee's case record with the New York City Department of Social Services, an affidavit by Eleanor Walsh, Deputy Commissioner of the New York State Department of Social Services and a memorandum of law. Defendant Goldberg filed an affidavit and an answer.

> or other criminal activity . . . To attempt to draw a distinction regarding the applicability of the Amendment dependent upon whether the caseworker intends to counsel the recipient as to how best to utilize his limited resources or to look for evidence of fraud, would invite a trial of every official's purpose—a task which would undoubtedly pervert the intent of the Amendment. There exists no valid reason for varying the protection afforded by the Amendment even assuming that the home visit is an effort to deal with a purely 'social problem'."

The majority thus reached the conclusion that appellee was entitled to "the guarantees of the Fourth Amendment" and added that the characterization of AFDC grants as a privilege did not mean that such grants could be conditioned on the relinquishment of a constitutional right.

The reality of the problems inherent in its position was briefly noted and quickly disregarded by the majority opinion:

> "While this Court clearly recognizes the necessity of and desirability for procedures which will enable the Department of Social Services to administer its programs with a minimum of loss due to fraudulent claims or the unwise allocation of these grants by deserving but inexperienced recipients, to the end that the limited funds provided by government may best be used to relieve the needs of those persons in actual want, see 81 C.J.S. Social Security & Public Welfare § 9, n. 70 (1953), when the conditions annexed to the enjoyment of these benefits require a waiver of rights secured by the Constitution, the governmental entity seeking to impose those conditions must show a compelling state interest therefor."

Relying exclusively on a series of First Amendment cases, Judge Tenney stated that it was not sufficient to show "a

rational relationship to some valid governmental policy" nor to show "merely that the public interest justifies the type of search in question."

It was the majority opinion that there could be no general exception to the constitutional warrant requirement where the public interest could be preserved and "[p]ermissive [*sic*] legislative goals" achieved by means "more narrowly" designed. The majority went on to propose a series of "[L]ess drastic means for achieving the same basic purposes for which the City and State urge home visits are designed". The Court, thus, viewed a duly-executed lease as proof of actual residence, birth certificates as proof of family composition, the availability of medical facilities as adequate to ascertain the well-being of the child, and the availability of information about goods and services in the offices of the Department "should the recipient wish to make her needs known there" as adequate to determine those needs. Finally, the Court found that "[t]he regularity of school attendance, academic achievement and information gathered from the interviews with school personnel can more accurately reflect the effects of a child's home environment than an interview with his or her parent in the home." Maurice James, the child of appellee, is two years old.

In the opinion of the majority "any of these factors or other circumstances or evidence indicate the propriety of or necessity for the search of private property in a particular case" an application may be made for a search warrant based on probable cause within the meaning of *Camara* v. *Municipal Court,* 387 U. S. 530, and "a suitably restricted search warrant" could issue.

The majority was also of the view that the home visit could be construed as designed to obtain evidence of criminal activity since New York Social Welfare Law, § 145 requires welfare officials to provide any information it obtains of such activity to prosecuting authorities and since, in 1933, the County Court of Westchester County

purportedly gave the law a broad interpretation. *People* v. *LaFace*, 148 Misc. 238, 266 N.Y.S. 458. Because "home visits may appropriately be considered searches for evidence of welfare fraud or other criminal activity . . . they become unauthorized intrusions upon the sanctity of plaintiff's home when consent thereto is not freely given."

After rejecting the argument that appellee must first pursue available administrative remedies, the opinion went on to distinguish the case of *Colonnade Catering Corp.* v. *United States*, 410 F. 2d 197 (2d Cir.), *cert. granted*,—— U. S. ——, 38 U.S.L. Week 3127 (October 13, 1969), upholding a conviction following a warrantless search by Internal Revenue agents of the licensed premises and the seizure of untaxed liquor. Judge Tenney said that the Second Circuit had found that, in contrast to *Camara* v. *Municipal Court, supra*, and *See* v. *City of Seattle*, 387 U. S. 541, the statutory inspection authority and *Colonnade* was "carefully defined and narrowed" and "granted 'little if any, more authority than that which would be extended in a warrant issued by a magistrate after review.' " The majority found "no such limitations upon the power of caseworkers" holding it insufficient that workers were not allowed to enter by force or under false pretenses or to look in closets and drawers. The opinion also relied on the distinction drawn by the Second Circuit between homeowners and licensees with respect to their knowledge of the limitations on inspection power.

Finally, the Court acknowledged that, "[T]here exists a pressing State interest in preventing such anti-social behavior as child abuse or neglect"; it recognized "the importance of eliminating from welfare rolls those whose receipt of benefits is undeserved" and it "hoped that caseworkers will continue to be welcomed into the homes of welfare recipients so that their professional expertise may most effectively be utilized to the greatest advantage of their 'clients'." It concluded, however, that "[t]he

laudable goal of beneficially supervising the expenditure of public funds will not be hindered or prejudiced by compliance, when necessary, with the Fourth Amendment's warrant procedure."

In dissent, Judge McLean first brought out the question of the children:

> "We are concerned here with a program of public assistance to dependent children who are to be cared for in their own homes. 42 U.S.C. § 601. It is essential that the welfare workers who administer this program enter the children's homes to ascertain the conditions under which they live. The purpose of the visit is to assist the children, not to catch the children's mother in a violation of the law."

Dealing with the warrant question, Judge McLean pointed out that the majority had left unclear the showing necessary to obtain a warrant but that, if the showing required was probable cause that the law had been violated, "the fundamental purpose of the program is ignored" and if a warrant could be obtained "merely by pointing out the need to inspect the home in order to carry out her duties, then the warrant is a mere formality". Judge McLean said that reading records, if they were available, "cannot be an adequate substitute for first-hand observations of living conditions in the home". He thought that the only result of a warrant procedure would be "to introduce a hostile arm's length element into the relationship between the welfare worker and the mother of the children, a relationship which can be effective only when it is based upon mutual confidence and trust".

Judge McLean viewed the *Camara* and *See* cases as distinguishable on their facts and concluded that the majority's extension of those cases to the instant case was "striking a damaging blow to the successful administration of this important social welfare program".

Despite the short time which the parties had had to prepare the case, despite the offer to produce additional material made by appellant at oral argument, despite the fact that appellant's memorandum of law was limited only to the question of a preliminary injunction and despite the fact that issue had been joined by the answers to the complaint, the District Court granted declaratory relief and a permanent injunction. The District Court did not enter its final order until October 1, 1969, some five weeks after the decision. That order did not include the stay requested by appellant. One week later, appellant sought a stay from Mr. Justice Harlan who denied it on October 21, 1969 stating:

> "While I am of the view that the issues involved in the State's proposed appeal are not insubstantial, I nevertheless am of the opinion that, primarily for two reasons, the stay requested of me should not issue. First, I am not convinced at this stage that the strength of the State's case is such as to justify my delaying the effectuation of the order of the District Court. Second, the balance of the equities involved in the granting or denial of a stay seems to me at this juncture to lie with the appellees.
>
> The application for a stay is accordingly denied, with leave to the State to renew its application to the full Court at the time of the filing of its Jurisdictional Statement."

The renewed application for a stay is submitted herewith.

ARGUMENT

The instant appeal presents several substantial questions of law requiring plenary consideration by this Court.

Relying on a mechanistic interpretation of the Fourth Amendment and failing to take account of the only concern of the program with which it was dealing, the child, the

decision below has dealt a serious blow to the effective administration of the most extensive AFDC program in the country.* The majority acted prematurely, precipitously and under erroneous standards to reach a result which serves neither personal well-being nor constitutional rights.

1. The holding of the District Court that New York may not require an AFDC applicant or recipient to permit a home visit by a caseworker in order to establish eligibility for such benefits severely hampers the effective administration of this large important program.

The AFDC program in New York City alone involves 187,214 cases, totalling 722,830 persons receiving benefits amounting to $53,620,000 a year.** The decision below necessarily affects the administration of the program with

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* Many States require home visits for initial and some for continuing eligibility for AFDC benefits. See *e.g.*, Ala., Manual for Administration of Public Assistance, Part I-8 (B) (1968 rev.); Ariz., Regulations promulgated pursuant to Revised Statute § 46-203, Reg. 3-203.6 (1968); Cal. State Dept. of Social Welfare Handbook, C-012.50 (1964); Fla. Public Assistance ch. 100; Ga. Division of Social Administration—Public Assistance Manual, Part III, Sec. V (D)(2), Part VIII (A)(1)(b) (1969); Mich. Public Assistance Manual, Item 243 (3) (F) (Rev. 1967); Miss. Code 1942 § 7177 (Laws of 1940 ch. 294); Mo. Public Assistance Manual, Dept. of Welfare, Sec. III (1969); Nebraska, State Plan and Manual Regulations, Part IX, §§ 5760, 5771; N. J., Manual of Administration, Division of Public Welfare, Part II, §§ 2120, 2122 (1969); N. M. Public Welfare Act, 13-1-13, Health and Social Services Department Manual §§ 211.5, 272.11; S. C. Dept. of Public Welfare Manual, Vol. IV (D)(2); S. Dak. L. 1967, 28-7-7 (formerly SDC 1960 Supp. 55.3805); Tenn. Code Ann. 14-301 *et seq.* 37-309, Public Assistance Manual, Vol. II, p. 212 (1968 rev.); Wisc. Public Assistance Law Sec. 49.19(2).

** 1968 figures. COMMITTEE ON WAYS AND MEANS, U. S. HOUSE OF REPRESENTATIVES. *Report of Findings of Special Review of Aid to Families with Dependent Children in New York City* (1969), Tables A-13; A-15. (Hereinafter, *Report of Findings of Special Review*).

respect to all of those persons as well as those in the rest of the State and with respect to anyone who in the future may assert eligibility for AFDC assistance. The required home visit struck down by the Court below is an integral part of the AFDC program and directly implements its purposes.

The purpose of the AFDC program is to provide for children who have no other means of support. The Court below wholly ignores them. It was the judgment of both Congress and the New York State legislature that children of parents with inadequate resources for their upbringing are, nevertheless, best cared for in the first instance in the home rather than in institutions and that, to effectuate this policy, it might be necessary to provide aid both to the child and to a parent or guardian. In assuming responsibility for the child, however, it was not the decision merely to dispense funds to the parent without regard to whether or not the child could be adequately cared for even with such aid. For, if the money allocated is not being spent to achieve the purposes of the program, there is no point to the allocation and the money either is not needed or the child is being harmed. Thus, while appellee is called a recipient, she receives payments not because she is needy but because she is a person whose services are required for the needy person, her child. She has undertaken a specific obligation not only to her child but to the State to which she has turned on her child's behalf. The focus is the child in the home. See 42 U.S.C. § 602. The Federal Handbook of Public Assistance Administration (Part IV, § 3452[10]) requires the assessment of "total parental functioning and home conditions upon the child." New York has expressed similar concern. N. Y. Social Services Law §§ 348-350, 353-354; 18 N.Y.C.R.R. § 369.2(c): "A child or minor shall be considered to be eligible for AFDC if his home situation is one in which his physical, mental and moral well-being will be safeguarded . . ." The continuing interest in the well-being of the child requires that:

"The fact that the welfare of the child is being safeguarded shall be confirmed at each regular contact with the family and as part of the periodic redetermination of eligibility . . ." 18 N.Y.C.R.R. § 369.4(b).

Where the law makes it perfectly clear that the home situation is the critical factor in the program, it is completely unrealistic to hold that the home may not be viewed by objective personnel or that there are adequate alternatives to such a view. The home visit provides information which it is conceded must be provided and which cannot reliably be obtained in any other fashion. First, the home visit serves to verify the need for assistance. While financial resources might be examined outside the home, household furniture and furnishings, for example, cannot. Second, it serves to verify family composition, including the number of persons actually resident in the home and third, it serves to verify actual residence at the address provided. In addition to verifying the technical eligibility criteria, the home visit insures that the child's day-to-day well-being is adequately protected:

> "An agency may provide recipients with a list of services available, but the recipient may not be aware or willing to acknowledge his need of a particular service, or for some reason may not request it. On the other hand, an alert and interested worker in a home visit may identify needs for which the agency may offer help, e.g., need for more adequate furnishings (which may be obtained from another community resource) or for repair of or removal from unsafe conditions, such as rickety steps or flooring . . . [or] unsafe heating devices. Help can be offered to improve housekeeping or child care though service might never be requested." (Affidavit of Eleanor Walsh, Deputy Commissioner of the Department of Social Services of the State of New York, Record on Appeal, Document No. 17.)

Such service is not optional with the parent when it goes to the suitability of the home environment for the child and, hence, the suitability of AFDC assistance. For assistance purposes, the parent is one factor in the home of the child. The determination of eligibility is also a recognition that the household is dependent on extra-familial resources and represents a shift in primary responsibility for the child. Thus, the judgment of the parent cannot be the final word. To the extent that the parent interposes a barrier between the child and the agency now charged with its welfare, their interests conflict and the mother may not be presumed to be acting for the child or protecting his interests.

The AFDC child is peculiarly susceptible to the hazards of life, to neglect and even abuse, not necessarily for want of love, but for want of means. He is, by definition, a one-parent child and may be one of several children in the family. The amount allocated for his care admits of no leeway in expenditure, the available housing is scarcely first-rate, there is no money available for baby-sitters. These are built-in factors for the creation of serious physical and emotional problems. Thus, the recently much-mooted problems of child neglect and abuse are inherently more prevalent in assistance households, a fact recognized by federal authorities. Advisory Council Report, U. S. Dept of Health, Education and Welfare; Welfare Administration, Bureau of Family Services, April, 1963. Indeed, the recent report on the administration of the New York City AFDC program (Report of Findings of Special Review, *supra*, p. 5) was in part based on home visits. Although federal regulation does not mandate home visits of all welfare clients it clearly mandates some (Handbook of Public Assistance Administration, Part II, § 6200).

The State of New York has, therefore, promulgated a rule that initial eligibility must be determined by a home visit (18 N.Y.C.R.R. § 351.10) and the required recertifica-

tion every three months must be determined by an interview or a home visit (18 N.Y.C.R.R. § 351.21).

The untenable and unrealistic view taken by the opinion below is highlighted by its recitation of "alternatives" for the home visit. Thus, the opinion considered that actual residence could be verified by a duly executed lease. The dissent pointed out that leases often are non-existent. Moreover, if the lease were to be the test of welfare eligibility, appellee would not be eligible since her lease was executed by a person described by her as her brother but on the lease as her husband (Defendant's Exhibit "1"). The majority below pointed out that family composition could be determined by birth certificates, but there is no reason for birth certificates accurately to reflect the persons actually in residence on the premises. The suggestion that the welfare of the child can be adequately discerned by examination of school records is not only irrelevant in this case, which involves a two-year-old child, but provides an inadequate substitute for a home visit which examines areas not necessarily relevant in a report prepared by an unknown third person not directly concerned with the problems involved. Medical examinations, while an obvious and important feature of the welfare of any person, may also provide merely *post-facto* evidence of a situation which might have been prevented and which might be prevented from recurring.

It is, however, with its final "alternative" that the majority below makes clear the thrust of its opinion and the weakness of its position. The majority decides that information about needed goods and services can be furnished by the recipient "if desired", supporting its conclusion by referring to the fact increasing emphasis is being placed on "declaration" of need rather than on investigation. As we have said, certain needs and services are not optional with the parent. Moreover, that this is a possible alternative, with respect to all factors of eligibility, does not make

it a constitutionally required one. It is for the Legislature to determine if the program can effectively operate without home visits, a decision which most authority seems to feel must be in favor of the visit. As the District Court said in *Snell* v. *Wyman*, 281 F. Supp. 853 (S.D.N.Y. 1968), *aff'd* 393 U. S. 323:

> "The plain flaw that nonetheless destroys plaintiffs' thesis is that it is brought to the wrong forum. Plaintiffs' complaints might move us to vote for changes if we sat as state legislators. But they do not approach the showing of irrationality or arbitrariness warranting exercise of the limited veto power of the federal judiciary under the Fourteenth Amendment.
>
> Against plaintiffs' views, as defendants point out, there are arguments of policy which can scarcely be dismissed as frivolous, whether or not we would find them convincing if the judgment of policy were for us.
>
> • • •
>
> It is appropriate from time to time to appreciate the full measure and continued vitality of what Mr. Justice Holmes meant when he said: 'The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.' Lochner v. State of New York, 198 U. S. 45, 75, 25 S. Ct. 539, 546, 49 L. Ed. 937 (1905) (dissenting). Now that his dissenting thought has won the day, we ought not to trivialize the achievement by viewing it only as the interment of Spencer's social doctrines. The principle applies to the social philosophers that most of us, including judges, find more persuasive than Spencer. If we were free to enforce what we may modestly deem our more enlightened view, we might seriously consider the changes plaintiffs propose. But we have no such power, and it is better in the end for everyone that this is so.* • •
>
> The principle counsels that it is not for federal judges to be 'liberal' or 'conservative' in advancing

and ordering measures which undoubtedly relate to basic matters of human decency and welfare. The constricted test in this forum is one of minimal rationality." (*Id.* at 862, 863).

The home visit falls well within the power of the state to adopt reasonable policies for administering welfare funds. *King* v. *Smith*, 392 U. S. 309 (1968). The Legislature can validly determine that it will not abdicate its responsibility by deferring to parental judgment in assessing the home. The instant case provides ample support for such a judgment. Appellee has never satisfactorily established her initial eligibility for assistance she has a serious money management problem, and, most important, she has a child who, in the first year of his life, was in the hospital two times, including once with a skull fracture. Appellee has also had complaints to make about the condition of her apartment, some of which were verifiable, and some of which were not.

Appellee's offer to submit to an interview outside her home is clearly not a viable alternative to the home visit requirement. Indeed, in view of appellee's lack of candor throughout her case history and her persistent refusal to cooperate and to provide relevant information no matter where she was asked it, her dependability in this regard is dubious at best.

In short, the home visit is not only a reasonable method for obtaining validly required information, it is often the only reliable way. The "alternatives" supplied by the opinion below are inadequate and fail completely to take account of the only relevant factor—the welfare of the child—the basis upon which AFDC aid is predicated.

2. The holding of the District Court that New York may not require an AFDC applicant or recipient to permit a home visit by a case worker raises serious questions respecting the proper interpretation of the Fourth and Fourteenth Amendments to the Constitution.

The interrelationship between the required home visit and the Constitution was analyzed in an inadequate and erroneous manner by the opinion below. The majority regarded the visit as a "search" within the meaning of the Fourth Amendment, holding appellee to be entitled to the protection of the Fourth Amendment, deemed a visit made only on threat of termination of aid to be an unconsented search and concluded that there could, therefore, be no such entry without a "valid search warrant", leaving for speculation any standards for such a warrant.

We have no quarrel with the proposition that appellee is entitled to the protection of the Fourth Amendment. However, the procession of "therefores" emerging from the analysis below misses the mark. For within the rubric of the Fourth Amendment lies the concept of reasonableness, a concept given short shrift by the majority. As this Court has held "[t]he basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against *arbitrary* invasions by governmental officials." *Camara* v. *Municipal Court*, 387 U. S. 523, 528 (1967) (emphasis supplied). Under any proper analysis, the home visit without a warrant is not arbitrary and is reasonable.

The opinion concedes as appellee conceded, and as we have shown, that the applicant or recipient has an obligation to provide the information necessary to establish eligibility for assistance. Appellee, making her own decision as to what is relevant, offers to provide such information outside her home. The offer, besides being of dubious value (Exhibit "1"), cannot foreclose examination of the

home which has a testimonial value of its own (see 1, *supra*). Appellee has not only not contested her obligation to provide information, she has never hinted that process is necessary to compel her attendance at an inquiry into her eligibility for the benefits she seeks or that the body from which she seeks assistant must provide her with testimonial immunity as well. It is strongly to be doubted that if appellee refused to answer questions relevant to her eligibility, even on Fifth Amendment grounds, she would be denied due process if she were also denied aid. See *Gardner* v. *Broderick,* 392 U. S. 273, 279; *Piemonte* v. *United States,* 367 U. S. 556, 559 n. 2; *Ullmann* v. *United States,* 350 U. S. 422, 431; *Brown* v. *Walker,* 161 U. S. 591, 600.

The invocation of the Fourth Amendment in this respect stands on no firmer ground. Appellee's obligation to furnish information extends in this situation to her residence. The right of privacy in that is no greater than her right of privacy in herself and in her answers. "For the Fourth Amendment protects people not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz* v. *United States,* 389 U. S. 347, 351 (1967). By making her home a relevant factor to circumscribed but important government concerns, appellee has limited her privacy because of the existence of the primary concern, the child, and has committed herself to a course of providing relevant information. This course does not violate the privilege against self-incrimination.

Thus, the reliance of the majority below on the possibility of criminal prosecution is misplaced. The remote possibility of criminal prosecution, which underlies any situation where benefit is sought to be secured by the furnishing of information, should not serve to place the entire administration of a program within the confines of the standards to be observed in conducting criminal prosecutions. See

United States v. *Walden*, 411 F. 2d 1109 (4th Cir. 1969). Obviously it is not the purpose of the home visit to obtain information for prosecutorial purposes. Contrast *Gardner* v. *Broderick, supra; Parrish* v. *Civil Service Commission*, 56 Cal. 260, 425 P. 2d 225, 57 Cal. Rptr. 623 (1967). This is strongly evidenced by the fact that the home visit was sought to be made here on a week's notice and by the fact that both state and local law and regulation make it abundantly clear that during the home visit there is to be no prying into closed places such as closets and drawers. N. Y. Social Services Law, § 134-a; Bulletin 916, N. Y. Department of Social Welfare, April 28, 1967, Appendix "E" (Record on Appeal, Document 15, Appendix "A"); Informational No. 67-41, N. Y. City Department of Social Services, July 3, 1967 (Record on Appeal, Document 15, Appendix "B"). Appellee, who has had home visits in the past, does not allege that her privacy was invaded in any such manner.

Even the problem of overpayment, which is particularly acute in New York City (Report of Findings of Special Review, *supra*), may provide no basis for criminal prosecution and need not be dealt with on that level. However, the agency certainly must know if it is indeed overpaying and should be able to correct the error. Should evidence nevertheless be obtained which might be made the basis of a criminal prosecution, it is a simple matter at the time of that prosecution to test the matter by motion to suppress any evidence obtained as a result of the home visit. *Murphy* v. *Waterfront Commission*, 378 U. S. 1; *United States* v. *Blue*, 384 U. S. 251, 256.

The proper framework for considering this case was set forth by this Court in *Schmerber* v. *California*, 384 U. S. 757, 768:

> "We begin with the assumption that once the privilege of self-incrimination has been found not to bar compelled intrusions . . . The Fourth Amendment's proper

function is to constrain not against all intrusions as such, but against intrusions which are not justified in the circumstances or which are made in an improper manner."

In the instant cases, as we have suggested, the visit is actually made on the consent inherent in the application for assistance which places the recognized responsibility on the applicant to provide relevant information.

Even if such consent is not deemed binding, the home visit is not an unreasonable intrusion even without a warrant.

Relying on its analysis of the home visit as a search within the meaning of the Fourth Amendment, the majority below held that, absent emergency, such a search was presumptively invalid relying on traditional search and seizure cases and on the decision of this Court in *Camara* v. *Municipal Court*, 387 U. S. 530. The Court said that such a presumption could not be overcome except by a compelling state interest which it found not to exist here. Of course, as point 1, *supra* amply indicates, the home visit does serve compelling state interests. Certainly it was simplistic to say that a warrant has always been required in this situation since the situation has never arisen before.

In any event the home visit is not a search in any traditional sense. This is not to say that it is not to be measured by Fourth Amendment standards of reasonableness—it is to say that its nature is to be taken into account as part of the assessment of its constitutionality. The home visit is not a search for incriminating evidence, it is not an inspection of an objective situation such as electrical wiring or other building violation and it is not directly enforceable by criminal sanction. It is a complex of tangible and intangible factors not designed to verify any isolated condition but directed to all of the factors bearing on the welfare of the children in the household and the fact

that allocated funds are being directed to that welfare. A search warrant, which is by definition a document specifying what is to be searched and seized is not, even after *Camara*, designed to deal with such a situation. It could not be specifically designed to cover all of the possibilities, unlike even the area inspection warrant directed to a specific problem.

Illustrative of the inappropriateness of a search warrant procedure is the remarkable lack of congruence among the complaint, the relief sought and the relief granted. The gravamen of the complaint, albeit in most conclusory terms, is that questions are asked during home visits which seek private information which are not relevant to the need for assistance. The allegation was not supported with even a single example. Nor was any explanation offered as to why questions are more irrelevant in the home than they are in the offices of the Department of Social Services. The District Court made absolutely no effort to deal with this aspect of the complaint, which certainly is not solved by a warrant and which, as we have said, is the entire basis for the complaint. The warrant solution simply creates more problems than it solves and insulates the child from the benefits which the AFDC program was designed to confer.

The regulations covering the conduct of a home visit narrow its scope as well as any warrant procedure possibly could. In the instant case there is no indication of any abuse of this policy. The visit which was refused was sought to be made by appointment a week in advance. On previous visits the worker always respected appellee's privacy in for example, not entering the bedroom when access was refused and neither threatened to nor terminated aid as the result of such refusal. By contrast, the cases relied on by the Court below involved either situation where no legitimate government interest was at stake (*Griswold* v. *Connecticut*, 381 U. S. 479) or an intolerable abuse of personal liberty. *Parrish* v. *Civil*

Service Commission, 57 Cal. Rptr. 623, 425 P. 2d 223 (1967).

Nor are the administrative search warrant cases applicable here. First, they involve the right to secure area search warrants to look for evidence of building violations and entry was enforceable by criminal sanction. Moreover, in those cases there was an attempt to enter premises by persons who had no special relationship to the plaintiffs. Plaintiffs had sought nothing and no question of eligibility for any benefit or proper allocation of public funds was involved. The principle reason why warrants were held to be required for area inspections was:

> "Under the present system, when the Inspector demands entry, the occupant has no way of knowing whether enforcement of the Municipal Code involved requires inspection of his premises, no way of knowing the lawful limits of the Inspector's power to search, and no way of knowing whether the Inspector himself is acting under proper authority." *Camara* v. *Municipal Court, supra* at 532.

See also *Ohio ex rel. Eaton* v. *Price,* 364 U. S. 263. By contrast in the instant case, the applicant or recipient knows that home visits are to be conducted, and the authority and limits of the inspection. Indeed, in this case appellee herself circumscribed the limits of the visit on more than one occasion with no adverse results.*

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* See also *United States* v. *Stanack Sales Co.,* 387 F. 2d 849 (3rd Cir. 1968); *Durovic* v. *Palmer,* 342 F. 2d 634 (7th Cir. 1965), *cert. den.* 382 U. S. 820; *Peeples* v. *United States,* 341 F. 2d 60 (5th Cir. 1965); *United States* v. *Duffy,* 282 F. Supp. 777 (S.D.N.Y. 1968).

In reaching its result the Court below departed from the decision of its own Court of Appeals in *Matter of Colonnade Catering Corp.* v. *United States,* 410 F. 2d 197, *cert. granted* 38 U.S.L. Week 3127 (October 13, 1969), in which the Court upheld the entry by agents of the Internal Revenue Service into licensed liquor prem-

(*footnote continued on following page*)

Moreover, warrants would be inimical to the successful administration of the AFDC program. As Judge McLean pointed out in dissent, "the warrant . . . [will] introduce a hostile relationship between the welfare worker and the mother of the children, a relationship which can be effective only when it is based upon mutual confidence and trust." The welfare worker would be transformed into a policeman and thus, in fact, undercut the privacy and dignity of the individual. A barrier would be erected between the worker and the child and the administration of the program would be severely straitened. *Cf. Flemming* v. *Nestor*, 363 U. S. 603.

Finally, no standards are set forth for the issuance of the new warrants. Must criminal standards be met because of the spectre of criminal prosecution? Must some other standard of probable cause be met? Is the requirement of periodic recertification a sufficient basis? If so, what is the use of the warrant? Is it really true that even an initial applicant may require a warrant be obtained? Is it necessary or sufficient to show refusal of entry? Or must a worker examine for example a school record and bring it before a magistrate for him to determine if a warrant is justified? And what would be sufficient? Tardiness? Low grades? Or must it be persistent truancy? Failure? Is this sort of determination really a constitutional question? Of course, none of these questions was raised by the administrative warrant cases, but the District Court, finding a superficial resemblance has created a myriad of serious problems by its reliance on them.

(*footnote continued from previous page*)

ises without a warrant. Indeed, in that case the refusal to submit to the inspection resulted in a forced entry and seizure and criminal prosecution. The Court viewed the statute in that case as being as narrowly limited as a warrant and found that the licensee should be expected to know the limits and authority of the scope of inspection. Under this rationale no warrant is required in the instant case either.

3. The District Court applied an incorrect standard of constitutional law in the instant case.

The District Court held that the burden was on the State to show that it had a compelling state interest in making the required home visit. This standard was improper. In the first place that standard has thus far been applied only in equal protection cases and not in cases involving claims of deprivation of due process. See e.g. *Snell* v. *Wyman*, 281 F. Supp. 853 (S.D.N.Y. 1968), *aff'd* 393 U. S. 323 (1969), where the three-Judge District Court held (281 F. 2d at 862, note 19):

> "Our point is a narrower one that the limited right of substantive due process insures only against the capriciousness reaching a level of irrationality not against judgments of policy that may be unwise or even 'harsh' in their balancing of competing interests."

Indeed, the inappropriateness of the standard announced by the District Court is evident from the fact that it in effect holds that there must be a compelling State interest in making even a reasonable search and seizure, to use its term. In any event, it is clear that there is a compelling State interest in the home visit.

4. The District Court acted prematurely and precipitously in granting plenary relief to appellee.

Proceeding on a time schedule which effectively precluded one of the defendants from even filing opposing briefs (Record on Appeal, Document No. 14) and which severely circumscribed the ability of appellant to produce additional material in support of its position, the District Court granted both a preliminary injunction and declara-

tory relief.* Declaratory relief was jurisdictionally unwarranted since, although answers were filed to the complaint, there was no finding with respect to any disputed issues of fact and no motion for summary judgment. This jurisdictional deficiency was compounded by the fact that in granting the permanent injunction the Court ignored the offer to obtain additional material made by appellant at the time of oral argument and ignored the fact that appellant's memorandum of law was limited to the question of a preliminary injunction. It is the same judicial impatience which brought the jurisdictionally deficient decision in *Golden* v. *Zwickler*, 394 U. S. 103, and produced the anomalous opinion in the present case barring New York from doing the most elementary and indispensible act vital to the achievement of the purposes of the AFDC program throughout the nation. It is an incontrovertible fact that without the opportunity for the home visits required by both federal and state provisions the rationale for the carefully designed AFDC program could not function.

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* It is also appellant's position that the single district judge had no authority to denominate this as a class action (*Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713) and that, in any event, there is a difference of position between an initial applicant and a recipient which makes it inappropriate to consider them as a single class.

In addition, appellee should have been required to exhaust her administrative remedies. In this case, appellee requested and received a hearing prior to the termination of assistance. Thus, unlike the situation in *Damico* v. *California*, 389 U. S. 416, there was here a prior invocation of state procedures which appellee should not be able to abandon in mid-stream to seek a federal forum. Exhaustion of administrative remedies was particularly important in this case because of the vague nature of the complaint and the essentially administrative nature of the relief sought. As we have said (*supra*, pp. 4, 22), appellee was essentially complaining about being asked unspecified questions. The nature of the questions asked, as well as the timing and other details of interviews are properly resolved by the administrative body involved.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, December 18, 1969.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellant Wyman

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

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Appendix "A"

Opinion

Tenney, J.

Plaintiff, individually and on behalf of her minor child and all other persons similarly situated, moves this Court for an order: a) convening a district court of three judges pursuant to 28 U.S.C. §§ 2281, 2284 for the purpose of hearing and determining her application for a permanent injunction restraining and enjoining the defendants from enforcing certain New York State Department of Social Services Regulations on the grounds that they violate the First, Fourth, Fifth, Sixth, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States; b) granting a temporary restraining order pursuant to 28 U.S.C. § 2284(3) restraining the defendants from discontinuing, reducing or denying public assistance grants to all persons who object to the continued enforcement of the regulations challenged herein; and c) determining that this action may properly proceed as a class action pursuant to Fed. R. Civ. P. 23(a), 23(b)(2).

Plaintiff has been a recipient of Aid to Dependent Children benefits (hereinafter referred to as "ADC") for the past two years. On May 8, 1969, she received a letter from her caseworker requesting an appointment to visit plaintiff in her home on May 14, 1969. In reply, plaintiff explained that while she was willing to discuss issues and supply any information reasonable and relevant to her continued receipt of public assistance, under no circumstances could the caseworker make a home visit. The caseworker explained that Department of Social Services Regulations require that she visit plaintiff in her home to discuss recertification of her case, and that refusal by plaintiff to permit such a home visit would result in the termination of her ADC benefits. While reiterating her

willingness to provide whatever information was requested at the offices of the Department of Social Services, plaintiff continued to deny her caseworker entry into her home.

On May 13, 1969, the New York City Department of Social Services sent plaintiff a notice of intent to discontinue her ADC benefits based upon her refusal to permit such a home visit. On May 27, 1969, a hearing held prior to the termination of public assistance was conducted at the Department of Social Services. Thereat, plaintiff again reiterated her desire to supply information relevant to her present needs, but declined to discuss such needs in her home. The Department's review officer, after determining that such home visits were required by law, upheld the caseworker's decision to terminate benefits effective June 2, 1969.

In reaching this decision, the review officer relied upon Section 175 of the Policies Governing the Administration of Public Assistance, which, in pertinent part, provides:

> "Mandatory visits must be made in accordance with law that requires that persons be visited at least once every three months if they are receiving Home Relief, Veteran's Assistance, or Aid to Dependent Children, and at least once every six months if they are receiving Old Age Assistance, Aid to the Disabled or Assistance to the Blind."

This Section was promulgated in accordance with Section 134 of the New York State Social Welfare Law,[1] and Sections 351.10, 351.21 of Title 18 of the New York Code of Rules and Regulations.[2]

It is well settled that the convening of a three-judge district court pursuant to 28 U.S.C. § 2281 is not required where the claim involved is "obviously without merit", where the constitutional questions presented are "insub-

stantial" in that prior court decisions have clearly and unequivocally foreclosed the matter in dispute or where the suit seeks merely to enjoin local officers seeking to enforce statutes of local as opposed to general or statewide application. 33 Brooklyn L. Rev. 157, 159-60 (1966). I find that the issues presented herein are neither insubstantial nor obviously without merit, and that the regulations sought to be enjoined are of statewide applicability. Without intimating any opinion on the merits of the within action, it seems abundantly clear that the recent decisions in *Thompson* v. *Shapiro,* 270 F. Supp. 331 (D. Conn. 1967), *aff'd* —— U. S. ——, 37 U.S.L.W. 4333 (1969); *King* v. *Smith,* 392 U. S. 309 (1968); *Griswold* v *Connecticut,* 381 U. S. 479 (1965); *McDonald* v. *United States,* 335 U. S. 451 (1948) and *Parrish* v. *Civil Service Comm'n of the County of Alameda,* 66 Cal. 2d 260, 425 P. 2d 223, 57 Cal. Rptr. 623 (1967) necessitate the convening of a three-judge district court to consider the substantial constitutional questions relating both to the Fourth Amendment's stricture against unreasonable searches and seizures and to the penumbral right of privacy and repose raised herein.

Pursuant to 28 U.S.C. § 2284(3), this Court "may at any time, grant a temporary restraining order to prevent irreparable damage." Based upon plaintiff's affidavit of June 6, 1969, such an order would seem appropriate at the outset of this action to prevent the termination of ADC benefits which ensure at least a minimal subsistence level of life and health for plaintiff and her child. *Ramos* v. *Health & Social Services Bd.,* Civil No. 67-C-329 (E. D. Wis., filed Nov. 7, 1967). Moreover, since the enforcement of the home visit regulation must inevitably cause irreparable injury to all persons who, while receiving public assistance grants are unwilling to consent to the entry of officials of the Department of Social Services into their homes, a restraining order protecting them from the denial

or termination of such grants based upon this refusal is equally necessary pending the determination by the full court of plaintiff's application. The harm to plaintiff and others similarly situated from continued enforcement of the regulations challenged herein is both clear and abundant, while the cost to the State and City is obscure and minimal. *Hernandez* v. *Freeman*, Civil No. 50333 (N. D. Cal., filed Dec. 30, 1968); *Burns* v. *Montgomery*, Case No. 49018 (N. D. Cal., filed April 19, 1968); *Griffin* v. *Bonin*, Civil No. 13,521 (W. D. La., filed March 7, 1968); *Alvardo* v. *Dunn*, Civil No. 12,399 (D. Conn., filed Feb. 14, 1968); *Ramos* v. *Health & Social Services Bd., supra.*

Finally, in that this Court is satisfied that: a) the class which plaintiff seeks to represent is so numerous that joinder of all members is impracticable; b) there are questions of law common to the class; c) the claims of the representative party are typical of the claims of the class; d) the representative party will fairly and adequately protect the interests of the class; and e) the party opposing the class has acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole, this action may properly proceed as a class action pursuant to Fed. R. Civ. P. 23.

In order to effectuate the terms of this opinion, a temporary restraining order has been entered effective at 4:00 P.M. on June 13, 1969.

So ordered.

Dated: New York, New York, June 13, 1969

CHARLES W. TENNEY
U.S.D.J.

Appendix "A."

FOOTNOTES

[1] "The public welfare officials responsible . . . for investigating any application for public assistance and care, shall maintain close contact with persons granted public assistance and care. Such persons shall be visited as frequently as is provided by the rules of the board and/or regulations of the department . . . in order that any treatment or service tending to restore such persons to a condition of self support and to relieve the distress may be rendered and in order that assistance or care may be given only in such amount and as long as necessary."

[2] "18 NYCRR 351.10. *Required Home Visits and Contacts.* Social investigation as defined and described . . . shall be made of each application or reapplication for public assistance or care as the basis for determination of initial eligibility.

a. Determination of initial eligibility shall include contact with the applicant and at least one home visit which shall be made promptly in accordance with agency policy. . . ."

"18 NYCRR 351.21. *Required Contacts.* Contacts with recipients and collateral sources shall be adequate as to content and frequency and shall include home visits, office interviews, correspondence reports. . . ."

Appendix "A."

TEMPORARY RESTRAINING ORDER

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

69 CIV. 2448

BARBARA JAMES, individually and on behalf of her minor child Maurice James, and on behalf of all other persons similarly situated,

Plaintiffs,

vs.

JACK R. GOLDBERG, individually and as Commissioner of the Department of Social Services of the City of New York; GEORGE K. WYMAN, individually and as Commissioner of the State of New York Department of Social Services,

Defendants.

Plaintiffs having moved this Court pursuant to Title 28, United States Code, Section 2284(3), for a temporary restraining order restraining Defendants Wyman and Goldberg from discontinuing or reducing public assistance grants to Plaintiff and the class she represents, for refusing to consent to a welfare official's entry into her home without a valid search warrant. This motion having been considered by this Court:

Upon the pleading, affidavits and briefs submitted on behalf of the parties, and the hearings held to date, and upon the finding by this Court that (1) substantial questions have been raised as to the constitutional validity of

the State Statute and regulations requiring home visits as a condition for the receipt of public assistance, which require further consideration by a statutory three-judge Court, and (2) Plaintiffs are now suffering irreparable injury when their aid is reduced or discontinued upon their failure to allow the welfare official to enter their homes, it is

ORDERED, ADJUDGED AND DECREED THAT, pending hearing and determination by a statutory three-judge Court of the constitutionality and validity of the State Statute and regulations requiring a home visit as a condition to the continued receipt of public assistance that:

1. Defendants, their successors in office, agents and employees, and all persons in active concert and participation with them, are hereby restrained from entering into the dwelling places of plaintiffs and other similarly situated, without obtaining a valid Search Warrant issued upon probable cause or on the basis of consent of the recipient freely given after the employee or welfare official has clearly stated to the recipient that failure to give such consent will not result in discontinuance, reduction or denial of welfare assistance or criminal prosecution.

Dated: New York, New York, June 13, 1969.

CHARLES W. TENNEY
U. S. D. J.

Effective 4:00 P.M. June 13, 1969.

CWT.

Appendix "B"

Opinion

Tenney, District Judge:

Plaintiff, individually and on behalf of her minor child and all other persons similarly situated, seeks injunctive and declaratory relief pursuant to Rule 57 of the Federal Rules of Civil Procedure and Section 1983, United States Code, Title 42, to secure rights, privileges and immunities under the Fourteenth Amendment to the Constitution of the United States, and Titles IV and XVI of the Social Security Act, 42 U.S.C. §§ 601 *et seq.*, 1381 *et seq.*, and the regulations promulgated thereunder. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1343(3)(4), which provides for the original jurisdiction of district courts in suits authorized by 42 U.S.C. § 1983, and by 28 U.S.C. §§ 1331, 2201, 2202.

This suit, commenced by order to show cause on June 6, 1969, seeks to prevent the termination of Aid to Families with Dependent Children (hereinafter referred to as "AFDC") benefits for failure to consent to the entry into plaintiff's home of officials of the Department of Social Services (hereinafter referred to as "the Department") upon the grounds that such termination constitutes a violation of both plaintiff's right to be secure in her home from unreasonable searches thereof and of her right to privacy. By order dated June 13, 1969, the District Court Judge, after memoranda and affidavits had been submitted and oral argument had thereon: (1) ordered, pursuant to 28 U.S.C. §§ 2281, 2284, the convocation of a statutory three-judge district court to consider the substantial constitutional questions relating both to the Fourth Amendment's stricture against unreasonable searches and seizures and to the penumbral right of privacy and repose raised herein; (2) found that the action may properly pro-

ceed as a class action pursuant to Fed. R. Civ. P. 23; and (3) granted, pursuant to 28 U.S.C. § 2284(3), a temporary restraining order protecting plaintiff and the "class" she represents from the denial or termination of AFDC benefits based solely upon their refusal to consent to the entry of officials of the Department into their homes, pending the determination by the full court of plaintiff's application.

Thereafter, additional memoranda and affidavits were submitted, and, on June 30, 1969, oral argument was had before the three-judge court.

The facts underlying the issues presented reveal that plaintiff, a resident of the City and State of New York, Bronx County, has been a recipient of AFDC benefits for the past two years. On May 8, 1969, she received a letter from her caseworker requesting an appointment to visit her at home on May 14, 1969. Plaintiff replied that while she was willing to discuss issues and supply any information reasonable and relevant to her continued receipt of public assistance, under no circumstances could the caseworker make a home visit. The caseworker explained that Department regulations require that she visit plaintiff in her home to discuss the recertification of her case, and that refusal by plaintiff to permit such a home visit would result in the termination of her AFDC benefits. While reiterating her willingness to provide whatever information was requested at the offices of the Department, plaintiff continued to deny the caseworker entry into her home.

On May 13, 1969, the Department sent plaintiff a notice of intent to discontinue her AFDC benefits based upon her refusal to permit such a home visit. On May 27, 1969, a hearing held prior to the termination of public assistance was conducted at the offices of the Department. Thereat, plaintiff again reiterated her desire to supply information relevant to her present needs, but declined to discuss such needs in her home. The Department's review officer, after

determining that such home visits were required by law, upheld the caseworker's decision to terminate benefits effective June 2, 1969.

In reaching this decision, the review officer relied upon Section 175 of the Policies Governing the Administration of Public Assistance, which, in pertinent part, provides:

> "Mandatory visits must be made in accordance with law that requires that persons be visited at least once every three months if they are receiving Home Relief, Veteran's Assistance, or Aid to Dependent Children, and at least once every six months if they are receiving Old Age Assistance, Aid to the Disabled or Assistance, to the Blind."

This Section was promulgated in accordance with Section 134 of the New York State Social Welfare Law,[1] and Sections 351.10, 351.21 of Title 18 of the New York Code of Rules and Regulations.[2]

In opposition to plaintiff's application for a permanent injunction restraining and enjoining the enforcement of these City and State Departments of Social Services Regulations on the grounds that they violate the First, Fourth, Fifth, Sixth, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States, defendants argue that: (1) the home visit is neither a search nor a seizure, but is merely designed to verify information as to eligibility for public assistance and is thus reasonably related to a valid governmental policy;[3] (2) the home visit is designed to make available to the recipient of AFDC benefits professional counseling so that the recipient can best utilize his limited resources;[4] (3) since the receipt of public assistance is a privilege, citing *King* v. *Smith,* 392 U. S. 309 (1968), plaintiff is obligated to provide necessary information so that this privilege can be recognized and implemented;[5] and (4) in contradictory statements,

"[t]here may be fraud . . . which should come to the attention of the administrative agency and which would not without home visits,'" and "[i]t is not the purpose of home visits to look for evidence of fraud or other criminal activity and there is no suggestion that entry is sought for these purposes.'"

The issue presented for determination by this statutory court, simply put, is whether the Department of Social Services can deny, reduce or terminate AFDC benefits to otherwise eligible persons who refuse to allow caseworkers to enter their homes without a warrant, issued upon probable cause. For the reasons which follow, we find that the Department may not.

The Fourth Amendment to the Constitution explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The overriding function and basic purpose of this Amendment is to safeguard the personal privacy, security and dignity of individuals against the arbitrary or unwarranted intrusion of governmental officials. *Camara* v. *Municipal Court of the City & County of San Francisco,* 387 U. S. 523, 528 (1967); *Schmerber* v. *California,* 384 U. S. 757, 767 (1966); *United States* v. *Mancusi,* 379 F. 2d 897, 903 (2d Cir. 1967), *aff'd,* 392 U. S. 364 (1968). The Amendment gives concrete expression to a right of the people which "is basic to a free society." *Wolf* v. *Colorado,* 338 U. S. 25, 27 (1949). As such, this right of privacy has been declared enforceable against the states through the Due Process Clause of the Fourteenth Amendment. *Stanford* v. *Texas,* 379 U. S. 476, 481 (1965); *Ker* v. *California,* 374 U. S. 23, 30 (1963); *Mapp* v. *Ohio,* 367 U. S. 643, 655 (1961).

Except in certain carefully defined classes of cases,[8] a search of a private dwelling without a warrant or proper consent is presumptively "unreasonable". *Katz* v. *United*

States, 389 U. S. 347, 357 (1967); *Camara* v. *Municipal Court of the City & County of San Francisco, supra* at 528-29; *Frank* v. *Maryland,* 359 U. S. 360, 380 (1959) (Douglas, J., dissenting); *Agnello* v. *United States,* 269 U. S. 20, 32 (1925). Therefore, the following issues present themselves for determination: (a) are the home visits required by the Department of Social Services in connection with the initial and continuing finding of eligibility "searches" within the meaning of the Fourth Amendment; (b) was the Fourth Amendment designed to protect plaintiff and the "class" she represents; and (c) assuming that (a) and (b) are answered in the affirmative, may the State condition the initial and continuing receipt of AFDC benefits upon a waiver of rights embodied in the Fourth Amendment?

Upon oral argument, the Attorney General urged that home visits could not be considered a "search" within the meaning of the Fourth Amendment in that caseworkers are instructed not to enter the home of an applicant for or recipient of benefits "without permission by force, or under false pretenses, and not to make a search of the home by looking into closets and drawers.'" The Fourth Amendment, however, governs all intrusions by agents of the public upon personal privacy and security. *Terry* v. *Ohio,* 392 U. S. 1, 18 n. 15 (1968). Any unauthorized physical penetration into the premises occupied by plaintiff is a search. In view of the fact that recent cases have expanded the scope of the Amendment so as to eliminate the necessity for a finding of an actual physical trespass upon a constitutionally protected area, *Berger* v. *New York,* 388 U. S. 41, 50-53 (1967) and the cases cited therein, defendant's restrictive argument would appear frivolous. The zone of privacy created by the Amendment encompasses the "sanctity of a man's home and the privacies of life" and therefore must consist of something more than his

closets and drawers. *Boyd* v. *United States,* 116 U. S. 616, 630 (1886); see also *Griswold* v. *Connecticut,* 381 U. S. 479, 484 (1965).

The Court in *Camara* v. *Municipal Court of the City & County of San Francisco, supra* at 530, found that while a routine inspection of the physical condition of private property was a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime, nevertheless the community interest in municipal fire, health and housing inspection programs was not superior to the important interests safeguarded by the Fourth Amendment's protection against official intrusion. We find this dispositive of the first issue presented and, accordingly, home visits must be considered "searches" within the meaning of the Fourth Amendment.

The guarantee of protection against unreasonable searches extends to the innocent and guilty alike. *McDonald* v. *United States,* 335 U. S. 451, 453 (1948); see also *Hoffa* v. *United States,* 385 U. S. 293 (1966), *rehearing denied,* 386 U. S. 940, 951 (1967); *Lewis* v. *United States,* 385 U. S. 206 (1966), *rehearing denied,* 386 U. S. 939 (1967). Like most of the Bill of Rights, the Fourth Amendment was not designed to be a shelter for criminals, but a basic protection for everyone. It reaches all, whether accused of crime or not. *Abel* v. *United States,* 362 U. S. 217, 254-56 (1960) (Brennan, J., dissenting); *Weeks* v. *United States,* 232 U. S. 383, 392 (1914). Since the most effective preventive against unlawful searches is the exclusion of their fruits from criminal evidence, this right must be upheld when asserted by those who transgress the law. But it cannot be inferred from this that the central thrust of the guarantee is to protect against a search for such evidence. "It is the individual's interest in privacy which the Amendment protects, and that would not appear to fluctuate with

the 'intent' of the invading officers." *Abel* v. *United States*, *supra* at 255. As Judge Prettyman argued in *District of Columbia* v. *Little*, 178 F. 2d 13, 16-17 (D. C. Cir. 1949), *aff'd on other grounds*, 339 U. S. 1 (1950):

> "[T]he common-law right of a man to privacy in his home . . . is one of the indispensable ultimate essentials of our concept of civilization. It was firmly established in the common law as one of the bright features of the Anglo-Saxon contributions to human progress. It was not related to crime or to suspicion of crime. It belonged to all men, not merely to criminals, real or suspected. . . . To say that a man suspected of crime has a right to protection against [the] search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity."

Judge Prettyman added that the Fourth Amendment applied to health inspectors as well as to police officers—indeed to every and any official of government seeking admission to any home.

> "We emphasize that no matter who the officer is or what his mission, a government official cannot invade a private home, unless (1) a magistrate has authorized him to do so or (2) an immediate major crisis in the performance of duty affords neither time nor opportunity to apply to a magistrate. This right of privacy is not conditioned upon the objective, the prerogative or the stature of the intruding officer. His uniform, badge, rank, and the bureau from which he operates are immaterial. It is immaterial whether he is motivated by the highest public purpose or by the lowest personal spite."

Judge Prettyman's argument was first accepted by Mr. Justice Douglas in his dissent to the Opinion of the Court in *Frank* v. *Maryland, supra* at 377-78. Subsequently, *Frank* was overruled by *Camara,* wherein the Court approved Judge Prettyman's holding by finding that "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. . . . [E]ven the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority. . . ."[10]

Therefore, governmental power to make a warrantless search is no greater even if the object of the search is not related to the discovery of evidence of welfare fraud or other criminal activity. *Abel* v. *United States, supra* at 254-56; *Iowa* v. *Union Asphalt & Roadoils, Inc.,* 281 F. Supp. 391, 408 (S. D. Iowa 1968). To attempt to draw a distinction regarding the applicability of the Amendment dependent upon whether the caseworker intends to counsel the recipient as to how best to utilize his limited resources or to look for evidence of fraud, would invite a trial of every official's purpose—a task which would undoubtedly pervert the intent of the Amendment. There exists no valid reason for varying the protection afforded by the Amendment even assuming that the home visit is an effort to deal with a purely "social problem". See *Verdugo* v. *United States,* 402 F. 2d 599, 611 n. 20 (9th Cir. 1968). Accordingly, plaintiff and the "class" she represents must be afforded the guarantees of the Fourth Amendment.

Even if we assume that AFDC grants are a privilege or governmental gratuity,[11] the power of government to decline to extend these benefits to its citizens "does not embrace the supposedly 'lesser' power to condition the receipt of those benefits upon any and all terms." *Parrish*

v. *Civil Service Comm'n of the County of Alameda*, 66 Cal. 2d 260, 425 P. 2d 223, 57 Cal. Rptr. 623, 630 (1967). For to deny plaintiff even a gratuitous benefit because of the exercise of a constitutional right effectively impedes the exercise of that right. *Thompson* v. *Shapiro*, 270 F. Supp. 331, 336 (D. Conn. 1967), *aff'd*, —— U. S. ——, 37 U.S.L.W. 4333 (1963). While this Court clearly recognizes the necessity of and desirability for procedures which will enable the Department of Social Services to administer its programs with a minimum of loss due to fraudulent claims or the unwise allocation of these grants by deserving but inexperienced recipients, to the end that the limited funds provided by government may best be used to relieve the needs of those persons in actual want, see 81 C.J.S. Social Security & Public Welfare § 9, n. 70 (1953), when the conditions annexed to the enjoyment of these benefits require a waiver of rights secured by the Constitution, the governmental entity seeking to impose those conditions must show a compelling state interest therefor. No showing merely of a rational relationship to some valid governmental policy will suffice. *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963); *Speiser* v. *Randall*, 357 U. S. 513 (1958); *Weiman* v. *Updegraff*, 344 U. S. 183, 191-92 (1952); *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 390 (1950); *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945). Nor will it suffice for the state to show merely that the public interest justifies the type of search in question. For the issue is not whether the public interest justifies home visits, but whether the initial or continued receipt of AFDC benefits can in consonance with the Constitution be made dependent upon the applicants' or recipients' submission to *warrantless* searches.[12]

The public interest may demand creation of a general exception to the Fourth Amendment's warrant requirement only when it can be demonstrated "that there are

available no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit." *Parrish* v. *Civil Service Comm'n of the County of Alameda, supra.* Permissive legislative goals may not be pursued by means that significantly inhibit fundamental personal liberties when the end can be more narrowly achieved. *Elfbrandt* v. *Russell,* 384 U. S. 11, 18 (1966); *Shelton* v *Tucker,* 364 U. S. 479, 488 (1960). This Court cannot with deference to the Fourth Amendment excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation make that course imperative. *Terry* v. *Ohio, supra; Berger* v. *New York, supra* at 114 (White, J., dissenting); *McDonald* v. *United States, supra* at 456; see also *Garrity* v. *New Jersey,* 385 U. S. 493 (1967); *Spevack* v. *Klein,* 385 U. S. 511 (1967). No such showing has been made herein.[13]

Less drastic means may be suggested for achieving the same basic purposes for which the City and State urge home visits are designed. Proof of actual residence may be ascertained, for example, by the submission of a duly-executed lease upon the premises in question. Family composition may be verified by the submission, in this instance, of birth certificates. The physical well-being of the child could be safeguarded by making available facilities for periodic medical examinations rather than by requiring routine home visits by caseworkers. This is especially true since there is no assurance that the child will even be present when the home visit is made. Information regarding goods or services which the recipient may need in the management of her home can equally be obtained in the offices of the Department should the recipient wish to make her needs known there rather than in the convenience of her home. The regularity of school attendance, academic

achievement and information gathered from interviews with school personnel can more accurately reflect the effects of a child's home environment than an interview with his or her parent in the home.

Should any of these factors or other circumstances or evidence indicate the propriety of or necessity for the search of private property in a particular case, application may be made to an appropriate judicial officer who, utilizing the standard of "probable cause", will test the particular decision to search against the constitutional mandate of reasonableness. Should this official determine that a valid public interest justifies the intrusion contemplated, then there exists probable cause to issue a suitably restricted search warrant. In this respect, it must be noted that the Court in *Camara* v. *Municipal Court of the City & County of San Francisco, supra* at 539, emphasized that "a health official need [not] show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime." This would appear applicable to the instant proceedings.

As previously indicated, the Attorney General has suggested that it is not the purpose of the home visit to look for evidence of criminal activity. This Court, however, must take notice of Section 145 of the Social Welfare Law, which provides that:

> "Any person who by means of a false statement or representation, or by deliberate concealment of any material fact, or by impersonation or other fraudulent device, obtains or attempts to obtain, or aids or abets any person to obtain public assistance or care to which he is not entitled, or does any wilful act designed to interfere with the proper administration of public assistance and care, shall be guilty of a misdemeanor, unless such act constitutes a violation of a provision of the penal law of the state of New York, in which

case he shall be punished in accordance with the penalties fixed by such law. Failure on the part of the person receiving public assistance or care to notify the public welfare official granting such assistance or care of the receipt of money or property or income from employment or any other source whatsoever, shall, upon the cashing of a public assistance check by or on behalf of such person after the receipt of such money, or property, or income, constitute presumptive evidence of deliberate concealment of a material fact. *Whenever a public welfare official has reason to believe that any person has violated any provision of this section, he shall refer the facts and evidence available to him to the appropriate district attorney or other prosecuting official."* (Emphasis added.)

The Court in *People* v. *La Face,* 148 Misc. 238, 266 N.Y.S. 458 (Westchester County Ct. 1933) found that "the crime as defined under section 148 of the Public Welfare Law," a section substantially identical to Section 145 of the present Social Welfare Law,[14] "is not the consummation of fraud upon a particular department. The essence of the crime is the false representation in an application for relief. It makes no difference whether the relief is obtained or could have been obtained." The breadth of the interpretation given the fraud statute in *La Face,* coupled with the fact that this Court must assume that caseworkers will comply with the provisions of Section 145 by referring facts or evidence of welfare fraud gathered by them in the course of home visits to the appropriate prosecuting official, sustains the view that home visits may appropriately be considered searches for evidence of welfare fraud or other criminal activity.[15] As such, they become unauthorized intrusions upon the sanctity of plaintiff's home when consent thereto is not freely given.

Defendants argue further that plaintiffs must first exhaust available administrative remedies prior to seeking a federal forum. However, one of the purposes of the Civil Rights Act, 42 U.S.C. § 1983, 28 U.S.C. § 1343, is "to provide a remedy in the federal courts supplementary to any remedy any State might have." *McNeese* v. *Board of Educ.*, 373 U. S. 668, 672 (1963). Relief under the Civil Rights Act may not, therefore, be defeated for failure to exhaust available state administrative remedies. *Damico* v. *California*, 389 U. S. 416, 417 (1967); *Kelly* v. *Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968).

The Court of Appeals for the Second Circuit in the recent decision in *The Colonnade Catering Corp.* v. *United States*, Docket No. 32817 (2d Cir., filed March 26, 1969) upheld a warrantless search by Internal Revenue Service agents of a catering establishment which held a New York State liquor license. In reversing the district court's order suppressing certain evidence seized, the Court of Appeals went to great lengths to distinguish *Camara* and *See* v. *City of Seattle*, 387 U. S. 541 (1967). The Court found that in contrast to the broad delegation of inspection power authorized in *Camara* and *See*, the statutory grants of inspection power under review were carefully defined and narrowed so that they granted "little, if any, more authority than that which would be extended in a warrant issued by a magistrate after review." We find no such limitations upon the power of caseworkers to enter and search the homes of applicants for or recipients of public assistance. It is not sufficient that caseworkers are instructed not to enter by force or under false pretenses and not to look in closets and drawers.

Further, the Court of Appeals noted that "[d]ealers in liquor, *unlike homeowners* or businessmen conducting less specialized activities, are engaged in a heavily regulated

business," (emphasis added) and, therefore, as "sophisticated licensees . . . are undoubtedly acquainted with the limits upon the agent's inspection rights." No such presumptions may properly be made herein. Defendant's reliance on *Colonnade* is, therefore, misplaced.

Accordingly, we find that the City and State may not condition the initial and continuing receipt of AFDC benefits upon a waiver of rights embodied in the Fourth Amendment. A contrary holding would threaten to "produce a result which the State could not command directly." *Speiser* v. *Randall, supra* at 526.

Doubtless there exists a pressing State interest in preventing such anti-social behavior as child abuse or neglect. But we see no reason why, in this respect, all families should not be treated alike. Specified procedures now exist under which the State can intervene in such circumstances to determine whether a child is neglected and, should such a finding be made, to regulate the neglected child's home or, if necessary, remove him from his home to insure that his needs are properly cared for.[16]

It is hoped that caseworkers will continue to be welcomed into the homes of welfare recipients so that their professional expertise may most effectively be utilized to the greatest advantage of their "clients". However, when entry is barred, benefits may not be denied or terminated solely on this basis.

This Court recognizes the importance of eliminating from welfare rolls those whose receipt of benefits is undeserved. Such efforts, however, must be, and clearly can be, conducted with due regard for the constitutional rights of welfare recipients. The laudable goal of beneficially supervising the expenditure of public funds will not be hindered or prejudiced by compliance, when necessary, with the Fourth Amendment's warrant procedure.

Appendix "B."

The oft-quoted protest of William Pitt would appear particularly, if not ironically, sound:

> "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!"

Plaintiffs' motion for a permanent injunction is granted. Submit order, on notice, in conformity herewith.

Dated: New York, New York, August 18, 1969.

WILFRED FEINBERG
U.S.C.J.

CHARLES W. TENNEY
U.S.D.J.

Appendix "B."

FOOTNOTES

[1] The public welfare officials responsible . . . for investigating any application for public assistance and care, shall maintain close contact with persons granted public assistance and care. Such persons shall be visited as frequently as is provided by the rules of the board and/or regulations of the department . . . in order that any treatment or service tending to restore such persons to a condition of self support and to relieve the distress may be rendered and in order that assistance or care may be given only in such amount and as long as necessary."

[2] "18 NYCRR 351.10. *Required Home Visits and Contacts.* Social investigation as defined and described . . . shall be made of each application or reapplication for public assistance or care as the basis for determination of initial eligibility.

a. Determination of initial eligibility shall include contact with the applicant and at least one home visit which shall be made promptly in accordance with agency policy. . . ."

"18 NYCRR 351.21. *Required Contacts.* Contacts with recipients and collateral sources shall be adequate as to content and frequency and shall include home visits, office interviews, correspondence reports. . . ."

[3] Memorandum of Law in Behalf of Dependant Wyman, dated June 26, 1969 at 5.

[4] *Id.* at 17.

[5] *Id.* at 26.

[6] *Supra* note 4.

[7] Memorandum of Law in Behalf of Defendant Wyman, *supra* note 3 at 31-32. By his affidavit of June 26, 1969, Leonard Bernikow, Assistant Corporation Counsel representing defendant Jack R. Goldberg, relies upon the brief submitted by the Attorney General for defendant George K. Wyman.

[8] As Mr. Justice Douglas noted in his dissent in *Frank* v. *Maryland*, 359 U. S. 360, 380 (1959):

> "We have emphasized over and over again that a search without a warrant can be made only in exceptional circumstances. If a house is on fire or if the police see a fugitive enter a building, entry without a search warrant can of course be made."

Additionally, under recently restricted circumstances, a warrantless search may be made as incident to a lawful arrest. *Chimel* v. *California*, —— U. S. ——, 37 U.S.L.W. 4613 (1969).

[9] Letter from Jack R. Goldberg to Lee A. Albert, April 11, 1969, Appendix A of Supplemental Memorandum in Support of Plaintiffs' Motion for Preliminary and Permanent Injunction.

[10] *Camara* v. *Municipal Court of the City & County of San Francisco*, 387 U. S. 523, 530-31 (1967).

[11] Recent scholarship has urged that the distinction between "rights" which are said to be vested and "privileges" which are said to be a mere government gratuity, be abolished. French, Comment: Unconstitutional Conditions: An Analysis, 50 Geo. L. J. 234, 236-39 (1961). Professor Charles Reich's theory of "entitlement" suggests that welfare benefits are no longer gratuities but have assumed at least some of the characteristics of "rights". Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L. J. 1245 (1965); Reich, The New Property, 73 Yale L. J. 733 (1964). See O'Neill, Unconstitutional Conditions: Welfare Benefits With Strings Attached, 54 Calif. L. Rev. 443 (1966).

[12] An analogy may be drawn between the listing of dependents on an income tax return and the listing of dependent children on applications for public assistance. Yet, could it be successfully argued that the right to obtain an income tax exemption for such dependents may lawfully be made dependent upon the taxpayer's consent to the warrantless entry into his home of Internal Revenue Service Agents?

[13] In this respect it should be noted that the Department of Health, Education and Welfare has proposed the elimination of individual investigations, except for spot checks, and the substitution of a declaration system under which the "agency accepts the statements of the applicant for or recipient of assistance, about facts that are within his knowledge and competence . . . as a basis for decisions regarding his eligibility and extent of entitlement." Dept. of HEW, Determination of Eligibility for Public Assistance Programs, 33 Fed. Reg. 17189 (1968).

[14] Section 148 of the Public Welfare Law provided:

> "Any fraud or false representation made by an applicant for relief, or by any person to secure relief for another person, or any wilful act designed to interfere with the proper administration of public relief and care, shall be deemed a misdemeanor."

[15] See also, in this context, 42 U.S.C. § 602(a)(16), (17), (18); N. Y. Penal Law §§ 155 *et seq.*; 18 NYCRR 347, 348, 351.1.

[16] Family Court Act Art. 3. (McKinney 1963).

Appendix "B."

McLEAN, D. J., dissenting

I am unable to agree with the court's conclusion in this case. We are concerned here with a program of public assistance to dependent children who are to be cared for in their own homes. 42 U.S.C. § 601. It is essential that the welfare workers who administer this program enter the children's homes to ascertain the conditions under which they live. The purpose of the visit is to assist the children, not to catch the children's mother in a violation of the law. To my mind it is unrealistic to regard this visit as a "search," and even more so to hold it to be an unreasonable search.

The court's opinion does not make clear what showing is to be made to obtain the warrant which the court considers necessary. If a warrant can issue only upon a showing of probable cause that the law has been violated, then the fundamental purpose of the program is ignored. Aid to dependent children becomes in effect another criminal statute. If, on the other hand, the welfare worker can obtain a warrant merely by pointing out the need to inspect the home in order to carry out her duties, then the warrant is a mere formality. The need is evident. A welfare worker's time should not be wasted in elaborating the obvious. Reading leases (if in fact there are any), birth certificates, school records and the like, cannot be an adequate substitute for first-hand observation of living conditions in the home. What the warrant will do, in my opinion, is to introduce a hostile arm's length element into the relationship between the welfare worker and the mother of the children, a relationship which can be effective only when it is based upon mutual confidence and trust.

Camara and *See* involved true searches. Those cases are distinguishable on their facts from this one. They do not

require the result which the court has reached here. The court has extended the doctrine of those cases in order to reach this result, thereby striking a damaging blow to the successful administration of this important social welfare program.

I would deny the motion and dismiss the action.

Dated: August 18, 1969

EDWARD C. McLEAN,
U.S.D.J.

Appendix "C"

Order for Permanent Injunction

Plaintiffs having moved this Court pursuant to Title 28, United States Code, Section 2281, for a permanent injunction enjoining defendants Wyman and Goldberg from denying, reducing or terminating public assistance to plaintiff and the class she represents, solely on the grounds of her refusal to consent to the entry into her home of welfare officials without a valid Search Warrant and this motion having been considered by this Court:

Upon the pleadings, affidavits and briefs submitted on behalf of the parties, and the hearings held to date, it is

Ordered, adjudged and decreed that Section 134 of the New York State Social Services Law, Section 175 of the Policies Governing the Administration of Public Assistance, and Sections 351.10, 351.21 of Title 18 of the New York Code of Rules and Regulations are invalid and unconstitutional in so far as they authorize or require state and local officials to deny, reduce or terminate Aid to Families with Dependent Children benefits on the ground that the applicant therefor or the recipient thereof refuses to consent to home visits by welfare officials; and it is further

Ordered, adjudged and decreed that defendants, their successors in office, agents and employees and all persons in active concert or participation with them, are hereby enjoined from depriving otherwise eligible persons of Aid to Families with Dependent Chiildren benefits by reason of their refusal to freely consent to the entry of welfare officials into their dwelling places without a valid Search Warrant.

Appendix "C."

Dated: New York, New York, October 1, 1969.

WILFRED FEINBERG
U.S.C.J.

CHARLES W. TENNEY
U.S.D.J.

I DISSENT:

EDWARD C. McLEAN
U.S.D.J.

Appendix "D"

Section 134 of the New York Social Welfare Law provides:

"The public welfare officials responsible under the provisions of section one hundred thirty-two for investigating any application for public assistance and care, shall maintain close contact with persons granted public assistance and care. Such persons shall be visited as frequently as is provided by the rules of the board and/or regulations of the department or required by the circumstances of the case, in order that any treatment or service tending to restore such persons to a condition of self-support and to relieve their distress may be rendered and in order that assistance or care may be given only in such amount and as long as necessary. Persons receiving care in an institution shall be visited as often as may be necessary in order that any service or care needed by them shall be provided and in order that institutional care shall be given only as long as it is advantageous for the person's welfare. The circumstances of a person receiving continued care shall be reinvestigated as regularly as the rules of the board or regulations of the department may require."

Title 18 of the New York Code of Rules and Regulations:

"Section 351.10. *Required Home Visits and Contacts.* Social investigation as defined and described . . . shall be made of each application or reapplication for public assistance or care as the basis for determination of initial eligibility.

a. Determination of initial eligibility shall include contact with the applicant and at least one home visit which shall be made promptly in accordance with agency policy . . ."

Appendix "D."

Section 351.21. *Required Contacts.* Contacts with recipients and collateral sources shall be adequate as to content and frequency and shall include home visits, office interviews, correspondence reports . . ."

Section 175 of the Policies Governing the Administration of Public Assistance which provides, in pertinent part:

> "Mandatory visits must be made in accordance with law that requires that persons be visited at least once every three months if they are receiving Home Relief, Veterans Assistance, or Aid to Dependent Children, and at least once every six months if they are receiving Old Age Assistance, Aid to the Disabled or Assistance to the Blind."